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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

FORREST H. BURLESON,
Appellant

vs.

JACQUELINE D. BURLESON
Appellee

On Appeal from the Court of Appeal
of California
Third Appellate District

JURISDICTIONAL STATEMENT

FORREST H. BURLESON
c/o Loretta H. Hellen
Attorney at Law
3101 First Avenue
Sacramento, CA 95817
(916) 455-7551

In Pro Per

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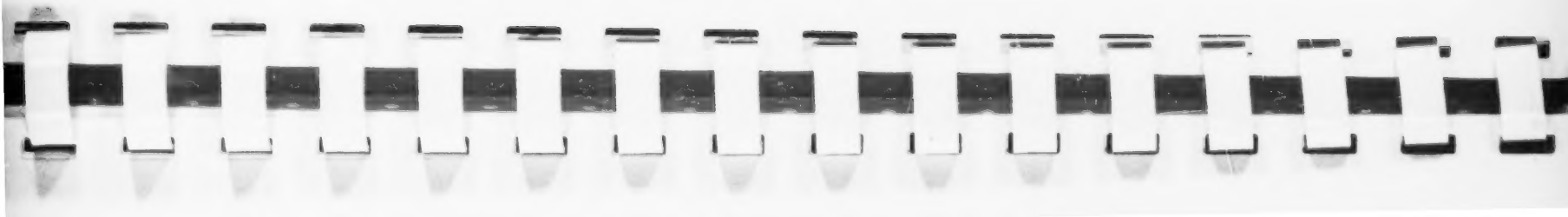

QUESTIONS PRESENTED FOR REVIEW

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THE STATES ARE PREEMPTED FROM RECHARACTERIZING THE PAY AS AS A PENSION BENEFIT

THE APPLICATION OF CALIFORNIA CIVIL CODE 4363.3 VIOLATES THE UNITED STATES CONSTITUTION

THE DIVISION OF PAY IMPAIRS THE EMPLOYMENT CONTRACT BETWEEN APPELLANT AND THE UNITED STATES AIR FORCE

THE STATE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PAY

THE FORMER SPOUSES' PROTECTION ACT IS UNCONSTITUTIONAL AS A DELEGATION OF EXCLUSIVE CONGRESSIONAL AUTHORITY

THE FORMER SPOUSES' PROTECTION ACT IS NOT RETROACTIVE

JURISDICTIONAL STATEMENT

Appellant Forrest H. Burleson appeals rom the final judgment of the Court of ppeal of California, Third Appellate istrict, following the California Supreme ourt's denial of his Petition for earing.

Because of appellant's challenge of he constitutionality of a state statute 8 U.S.C. §2403 may be applicable. ecause of the involvement of the United tates Constitution and federal laws overning the schema for military retired ay, 28 U.S.C. §1331 provides original urisidction of this Court. [Also see .S. Const. Art. III, §2 (1) and (2)]

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On Appeal from the
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OPINIONS BELOW

The opinion of the Superior Court of the State of California for the County of Yuba is unreported; however, it is printed in the App. B, infra. The opinion of the Court of Appeal for the State of California, Third District, is unreported; however, it is printed in the App. A., infra. The opinion of the Supreme Court of the State of California is unreported; however, it is printed in App. C., infra.

JURISDICTION

The Order of the Superior Court awarding Appellee a property interest in the military retired pay of Appellant as an "omitted" community property asset was entered on May 11, 1987. On April 21, 1988, the Court of Appeals affirmed this decision. On July 13, 1988, the California Supreme Court denied Appellant's petition for hearing.

This appeal is being docketed within 90 days of the California Supreme Court's denial of Appellant's petition for hearing. The federal court has jurisdiction pursuant to Title 28 United States Code S1331.

Appellant argued below that California Civil Code §4363.3 [providing for the division of pension benefits as community property upon dissolution], as applied to appellant's retainer pay, is repugnant to

federal statutes and invalid under the United States Constitution, notwithstanding the enactment of the Former Spouses' Protection Act (10 U.S.C. 1408).

This Court's jurisdiction is involved under 28 U.S.C. 1257 (2). Dahneke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); McCarty v. McCarty, 453 U.S. 210 (1981).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of California Civil Code §4363.3. This case also involves, in primary part, the Federal Uniformed Services Former Spouses' Protection Act (hereinafter referred to as "FSPA"), 10 U.S.C. §1408, which provides, in subparagraph (c)(1), as follows:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning

> after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The entirety of §1408 is set forth in Appendix F, along with Constitutional provisions which Appellant invokes in his behalf: The Contract Clause, Art. I, §10(1); the Supremacy Clause, Art. VI, Cl. 2; Art. I §8, Cls. 12, 13, 14, and 18 [providing exclusive delegation of authority to Congress to raise and support armies].

STATEMENT OF THE CASE

In 1975 the parties obtained a dissolution of marriage in Yuba County Superior Court of the State of California. Appellant's contention that all property had been disposed of by written agreement was uncontested by Appellee; a stipulated marital settlement agreement was filed with and adopted by the trial court on Septem-

ber 26, 1975 (App. D). Appellee quit claimed to Appellant all property in his possession (App. D).

Appellant is a commissioned officer in the United States Air Force, separating from active duty after more than 20 years of continuous, active duty service and continuing on inactive duty status.

Pursuant to the marital settlement agreement (which did not specifically mention the pay), Appellant received 100% of his pay as his sole and separate property.

On December 30, 1985, Appellee brought a separate action in equity seeking division of the pay as an "omitted" community property asset.

On May 11, 1987, the trial court ordered and adjudged the division of pay, awarding 49% of Appellant's future and unearned pay to Appellee as her sole and separate property (App. B).

The Court of Appeal confirmed that judgment (App. A).

Appellant filed a petition for hearing with the Supreme Court of California. The Petition was denied without comment on July 13, 1988 (App. C).

THE QUESTIONS ARE SUBSTANTIAL

The questions warrant plenary consideration for nine (9) reasons:

I

THIS COURT HAS JURISDICTION

This case deceptively appears to be one of domestic relations, which is left to State law, Trustees of Dartmouth College v. Woodward 4 Wheat (17 U.S.) 518 (1819); Maynard v. Hill 125 U.S. 190 (1888); this appearance is false.

Where State law attempts to contradict or restructure significant federal law in the area of military pay, the States will be preempted, McCarty v. McCarty 453 U.S.

210 (1981); Hisquierdo v. Hisquierdo 439 U.S. 572, 581, 59 L. 2d. 2d 1, 99 S. Ct. 802 (1979); United States Constitution, Article VI, Cl. 2. 1/

The SINGLE legal theory by which California domestic relations courts may award the a property interest in the pay to a former spouse is based upon the premise that the pay is OWNED (as a property right) by the member before he actually receives it. This has been established as a false premise for over 100 years, United States v. Tyler 105 U.S. 243 (1881); Costello v. United States (9th Cir. 1978) 587 F. 2d 424 cert. den. 442 U.S. 090 (1979); McCarty v. McCarty 453

1/ "State family and family-property law must do 'major damage' to clear and substantial federal interests before the Supremacy Clause will demand that state law be overriden," Hisquierdo v. Hisquierdo, supra, at 581.

U.S. 210 (1981). As this Court stated in McCarty:

> Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement plan... These factors have led several courts, including this one, to conclude that the military retired pay is reduced compensation for reduced current services. In United States v. Tyler, 105 U.S., at 245, 26 L. Ed 985, the Court stated that retired pay is "compensation ...continued at a reduced rate, and the connection is continued, with a retirement from active service only." 69 L. Ed. 2d 599-600.

California maintains that the member receives the pay and is paid as a trustee for the community, In re Marriage of Fithian (1977) 74 C.A.3d 397. The member literally owns the right to be paid retainer pay for the balance of his lifetime without further obligations to the military service at the time that he separates from active duty, In re Fithian

(1974) 10 Cal. 3d 592. This characterization has NEVER been tolerated by the federal courts, Wissner v. Wissner 338 U.S. 655 (1969); Costello v. United States, supra, 587 F. 2d 424.

The law is repleat with cases wherein State courts have been granted authority to act/apply state law regarding federal property; however, where the application of State law substantially infringes upon the federal statutory schema for federal property, this Court has exercised its jurisdiction to ensure the State conforms to the federal schema, McCune v. Essign 199 U.S. 390 (1905); Hisquierdo v. Hisquierdo 439 U.S. 572, 583, 59 L. Ed. 2d 1, 99 S. Ct. 802 (1979) ["The pertinent questions are whether the right as asserted conflicts with the express terms of federal laww and whether its consequences sufficiently injure the objectives of the

federal program to require nonrecognition"]; Wissner v. Wissner 338 U.S. 655 (1950); Ridgway v. Ridgway 454 U.S. 46 (1981) [regarding military matters of pay and entitlements]; McCarty v. McCarty 453 U.S. 210 [specifically regarding characterization of the pay].

This Court is affirmatively charged with the duty to take and resolve federal questions:

> [This Court has] no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution, Cohens v. State of Virginia 19 U.S. 405 (1821).

Thus, this Court has jurisdiction and should exercise jurisdiction.

II

THE STATES ARE PREEMPTED FROM RECHARACTERIZING THE PAY AS A PENSION BENEFIT

The remaining question that this Court

reserved from its decision in McCarty v. McCarty, supra, 453 U.S. 210 is whether the State courts are preempted from recharacterizing the pay as a "pension benefit".

> Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation, McCarty v. McCarty, supra, 453 U.S. 210, 69 L. Ed.2d 600.

The next question is whether the FSPA confers the power to the States to recharacterize the pay. The language of the Act clearly provides no such power or authority. The Comptroller General of the United States remarks as follows:

> As to Colonel Smith's suggestion that military retired pay is current compensation rather than a pension for past services, we note that the Act in no way redefines retired pay but merely allows state courts to treat this current compensation as divisible property if permissible under state law, Opinion of Comp-

troller General of the United States, File No. B-221190 (unpublished), dated February 11, 1986. Judicial Notice taken by trial court below.

Congress alone has the power and authority to regulate the pay for military service and to determine what constitutes military service for which compensation is required or payable 2/.

2/ United States Constitution, Article I, Section 9, Clause 8; United States v. Standard Oil (1947) 332 U.S. 301 [holding personnel affairs/pay subject exclusively to U.S. regulations]; Free v. Bland (1962) 369 U.S. 663 [holding that federal law and congressional enactments control the determination of the character of retired pay as present earnings; United States v. Tarble (1872) 80 U.S. 397 ["Now, among the powers assigned to the National Government, is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, ... the compensation he (serviceman) shall be allowed ... No interference with the execution of this power the National Government in the formation, organization and government of its armies by any state officials could be permitted without

State courts may not redefine military retired pay 3/.

Appellant is under contract for services and is, therefore, an employee with the United States Air Force, now separated from active duty and continuing to serve the United States Air Force as a commissioned officer on inactive duty status. His right to receive retainer pay or retired pay is established by federal statute 4/ and is a yearly appropriation

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[Fn. 2 Cont'd] greatly impairing the efficiency, if it did not utterly destroy, this branch of public service," at page 408), cited with approval in McCarty v. McCarty, 453 U.S. at 232-234].

3/ Wissner v. Wissner (1950) 338 U.S. 655.

4/ Bell v. United States (1961) 366 U.S. 393 [holding that a soldier's entitlement to pay is dependent upon a federal statutory right]; Goodley v. United States 441 F. 2d 1175; Costello v. United States, (9th Cir., 1978 587 F. 2d 424, cert. den. 442 U.S. 929 (1979) [stating "the contract seems to mean that Stevens will receive the pay authorized by statute from time to time as he performs his service."]

by Congress [United States v. Larionoff (1977) 431 U.S. 864] in consideration for his continuing services and observance of restrictions 5/. Congress has determined that the military member will be on indefinite service contract with this nation; he will continue in the capacity of his

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5/ [forfeiture of pay upon employment subject to "supervision and control" of foreign gov't; Hostinsky v. United States (1961) 292 F. 2d 508 [prohibition against dual officer status/pay; 5 U.S.C. 62; Hooper v. Hartman 163 F. Supp 437 aff'd (9th Cir., 1959) 274 F.2d 469 (Rear Admiral tried by court martial for charges arising post retirement and, when found guilty forfeited contract for indefinite service and the right to earn military retired pay)].

Other restrictions include the following: (a) reductions in pay if certain employment accepted (5 U.S.C. 5532); (b) forfeiture of pay for certain crimes (5 U.S.C. 8312); (c) forfeiture if employed by foreign government (U.S. Const. Art. I, Sec. 9, Cl. 8); (d) forfeiture of pay for employment with defense work for private firms within three years of retirement (37 U.S.C. 801; (e) recall involuntarily; (f) forfeiture if foreign citizenship is acquired (37 Comp. Gen 207; 41 Comp. Gen 715; (f) subject to UCMJ.]

"retiring" rank unless the he violates the terms and conditions of his employment contract with the United States Armed Forces -- thereby disqualifying himself from continued service to this country and disqualifying himself, consequently, from receiving military retired pay. Congress has expressly retained the inactive duty member and makes monthly (periodic) payments to him in consideration for his continuing but reduced) services to the United States Armed Forces 6/.

The United States Supreme Court, for over 100 years, has recognized and held

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6/ United States v. Morton (1884) 112 U.S. 1; United States v. Mills (1904) 197 U.S. 223; Kahn v. Anderson (1920) 255 U.S. 1; Leonard v. United States (1928) 279 U.S. 40; Puglisi v. United States (Ct. Cl. 1977) 564 F. 2d 403, cert. den. 435 U.S. 968 (1978); Lockhard v. Mittlemann (2nd Cir., 1941) 123 F. 2d 703; Andrews v. United States (1966) 175 Ct. Cl. 561; Chambers v. Russell (N.D. Cal. 1961) 192 F. Supp. 425; Hooper v. Hartman (S.D. Cal.

that in the absence of retainers being paid to the military member on inactive duty status, the United States would be without right to subject the member to (1) continuing obligations and restrictions, or (2) recall to active duty, United States v. Tyler, supra, 105 U.S. 243.

Thus, the sustaining of this retainer pay as a "personal entitlement" and the "current earnings" is crucial to the federal goals and objectives, United States v. Tyler, supra, 105 U.S. 243 (1881); 10 U.S.C. 2771; McCarty v. McCarty 453 U.S. 210. Consequently, the State courts are

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[fn. 6 con't] 1958) 163 F. Supp. 437, aff'd 274 F. 2d 429 (9th Cir., 1959); United States v. Tyler (1881) 105 U.S. 243; Costello (and Stevens) v. United States, 587 F. 2d. 424 (9th Cir., 1978) cert. den. 442 U.S. 929 (1979); Watson v. Watson, 424 F. Supp. 866 (1976); Hostinsky v. United States (1961) 292 F. 2d 508, 154 Ct. Cl. 443.] (1979);Costello v. United States, 587 F. 2d 424 (9th Cir., 1978), cert. den. 442 U.S. 909

preempted from recharacterizing the pay as deferred compensation, Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp 331 U.S. 218 (1947).

The military retired pay is paid to the military member as current earnings -- a "personal entitlement" for personal services rendered to the United States Armed Forces 7/.

California courts, without exception, are bound by the decisions of the United States Supreme Court regarding the characterization of pay as current earnings for current services, United States v. Tyler (1881) 105 U.S. 243; Wissner v. Wissner (1950) 338 U.S. 655; Auto Equity Sales v.

7/ Wissner v. Wissner 338 U.S. 655, 657 (1950); 10 U.S.C. 2771; Lemly v. United States (1948) 75 F. Supp 248, 109 Ct. Cl. 760; McCarty v. McCarty (1981) 453 U.S. 210.]

Superior Court (1962) 57 Cal. 2d 450. 8/

Notwithstanding the admonition that this Court issued that the state courts should "tred" carefully in applying State law lest they disrupt the federal statutory schema (McCarty v. McCarty (1981) 453 U.S. 210), the California courts have routinely ignored this admonition and the

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8/ Holding that "...Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a highest court"; See also, Central Bank v. Superior Court (1973) 30 Cal. App. 3d 962; People v. Estrada (1965) 234 Cal. App. 2d 136; Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal. 2d 759 [all holding that State may interpret federal statute, but State bound by federal characterizations and definitions]. See also, United States Constitution, Art. VI ["This Constitution and the laws of the United States which shall be made in pursuance therefore; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."]

constraints of the Former Spouses' Protection Act alike; the California courts proceed to divide gross pay rather than net pay, divide disability pay and ignore Stare Decisis of this Court routinely and with apparent immunity. [See Casas v. Thompson (1986) 42 Cal 3d 131.]

This Court addressed the priority of application of State and Federal law in United States v. Yazell (1966) 382 U.S. 341, 352. The inescapable conclusion is that the State law must yield to the federal statutory schema. 9/

9/ "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. [Free v. Bland (1962) 369 U.S. 663, 666; Gibbons v. Ogden (1824) 9 Wheat. 1, 210-211, cited with approval in Ridgway v. Ridgway (1981) 454 U.S. 46".

III

THE APPLICATION OF CIVIL CODE §4363.3 VIOLATES THE U.S. CONSTITUTION

The U.S. Constitution, Article I, §10(1) prohibits States from passing any laws that impair contract rights.

California appellate courts have held that

> a party cannot by negligence or design withhold issues and litigate them in consecutive actions, Kelley v. Kelley (1977) 73 C.A.3d 672.

Even though California was dividing such pay and she admits she knew of receipt of the pay at the time of the dissolution and the judgment (by written stipulation) had been final for more than 10 years, California recharacterized the pay from separate property (App. D) to community property and divided the pay, contrary to the agreement and judgment. Under these circumstances this division is prohibited by the United States Constitu-

tion, Article X, §1(1).

IV

THE DIVISION OF PAY IMPAIRS THE EMPLOYMENT CONTRACT BETWEEN THE APPELLANT AND THE UNITED STATES AIR FORCE

Appellant and the United States Air Force have a written contract for indefinite employment.

In consideration of the employment contract, Congress sets a salary to be earned on a daily basis by Appellant as a "personal entitlement", Watson v. Watson, 424 F. Supp. 866 (1976); United States v. Tyler, supra, 105 U.S. 243; McCarty v. McCarty, supra, 453 U.S. 210. These daily earnings are essential to Congressional ability to impose the obligations and restrictions upon Appellant which Congress has deemed to be vital to the security of this nation, Costello v. United States, 587 F. 2d 424 (9th Cir., 1978), cert. den. 442 U.S. 909 (1979).

Pursuant to FSPA, California courts applied Civil Code §4363.3 to the pay before it is paid to member; this resulted in the awarding of a property interest/ ownership interest of Appellant's future pay to Appellee of 49%.

To the extent that Appellant no longer has title to the funds as he earns the consideration of his employment contract nor is the pay a "personal entitlement", the application of California Civil Code section 4363.3 impairs the obligations of the contract between the United States Air Force and the Appellant. This impairment is substantial and material to the contract and is repugnant to the U.S. Constitution, Article I, Section 10(1).

The Congress cannot have both advantages. Either Congress must pay the entire consideration to the member as present pay and protect that characterization of

present pay OR Congress must release the member from all obligations, which clearly threatens national security, McCarty v McCarty, supra, 453 U.S. 210, 69 L. Ed. 2d 589, 599.

V

MARRIAGE DOES NOT DESTROY CONSTITUTIONAL PROTECTIONS

The parties have a final judgment and contract for disposition of property (App. D). Under the Contracts Clause of the U. S. Constitution, Article I, §10(1), the application of state law to renegotiate the terms of the contract, over the objection of a party to the contract, is unconstitutional. However, this Court has held that, in the area of marriage relations, the marital partner has no such constitutional protection.

> [The Contracts Clause] never has been understood to restrict the general right of

the legislature to legislate on the subject of divorce," Trustees of Darmouth College v. Woodward (1819) 4 Wheat. (17 U.S.) 518, 629.

California, however, recognizes and permits married persons to treat their property as the see fit (Family Law Act, permitting marital settlement agreements and transmutation of characterization of property by agreement of the parties). In permitting the marital parties to do so, Appellant contends that the constitutional protections apply to the contracts entered into and fully executed by the parties, especially where said contract is adopted and ratified by the California trial court and entered into judgment.

VI

THE STATE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PAY

The characterization of military retired/retainer pay is critical to the question of the divisibility of the pay.

Given the federal characterization of the pay as current earnings, the pay is NOT a divisible asset upon divorce/legal separation under the existing law of this State. 10/

10/ California Family Law Act (1970) California Civil Code §4000 et seq; California Rules of Court, Special Proceedings (Rule 1212); Lang v. Superior Court, 153 C.A. 3d 510; California Civil Code 4351 (providing jurisdiction over the property rights of the parties); California Civil Code §5110-5118 [providing that the future earnings of a party on dissolution are the sole and separate property of the earning party. California Civil Code §4363.3 (providing jurisdiction over deferred compensation benefits); In re Marriage of Brown (1976) 15 Cal. 3d 838, 845 (holding that the characterization of funds as "pension" hinges upon proof that those funds "are properly part of the consideration earned by the employee" during marriage and on active duty, citing In re Marriage of Fithian, supra, 10 Cal. 3d 592 at 596); Johnson v. Johnson (1963) 214 C.A. 2d 20 (holding that future earnings of a party are not subject to division or jurisdiction of the domestic relations court); Tilghman v. Superior Court (1974) 238 C.A. 2d 398 (no jurisdiction over future earnings); In re Marriage of Wicks (1978) 80 C.A. 3d 329 (holding that incentive pay, though an entitlement earn-

VIII

THE FORMER SPOUSES' PROTECTION ACT IS UNCONSTITUTIONAL AS A DELEGATION OF EXCLUSIVE CONGRESSIONAL AUTHORITY

Clearly, the raising and maintaining of the military is exclusively a function reserved by the United States Constitution to Congress. By virtue of the Constitutional reservation of authority to Congress, likewise, Congress may not delegate its authority, Knickerbocker Ice Company v. Stewart (1920) 253 U.S. 149. This Court held that the delegation of power to the various states to pass laws which would control or affect the Congressional schema was an unconstitutional delegation of authority by Congress. California

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Fn. 10 (Cont') ed during marriage, is separate property where services rendered after separation); California Civil Code §5118 (future earnings of a party are the separate property of the earning party after separation.

applies its law to the pay pursuant to the FSAP [Casas v. Thompson (1986) 42 Cal. 3d. 131]; however, the FSPA is an impermissible delegation of non-delegable Congressional power.

IX

THE FSPA IS NOT RETROACTIVE

This judgment was predicated upon the premise that the parties were "tenants in common", sharing an equal but undivided property interest in Appellant's military retired benefits from the DATE OF MARRIAGE in 1953, In re Marriage of Brown (1976) 15 Cal. 3d 838. However, it was not until February 1, 1983, with the enactment of the Former Spouses' Protection Act, that California had any authority to apply its community property to the retired pay. Thus, the earliest date in time that Appellant could have taken any action to protect his "personal entitlement" to

receive the military pay as his sole and separate property was February 1, 1983.

The taking, however, occurred commencing in 1953 and for nearly 20 years thereafter. The first notice that Appellant received of the taking was in 1986 when he was served with this action.

The Fourteenth Amendment of the United States Constitution provides and guarantees to Appellant that no State ..."shall deprive any person of life, liberty, or property, without due process of law." Clearly, it is not constitutionally permissible to enact legislation in 1983 which transforms conduct undertaken in 1953 into a loss of property rights, even under California law, In re Marriage of Fabian (1986) 41 Cal.3d 440; In re

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Marriage of Boul (1985) 39 Cal.3d 751 11/; In re Marriage of Sharpe (1983) 143 Cal. App. 3d 469 12/

Application of Civil Code §4363.3 violates Appellant's right to timely notice, Pennoyer v. Neff 95 U.S. 734; Mullane v. Central Hanover Bank and Trust (1950) 339 U.S. 306. In Appellant's case, the giving

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11/ Holding that retroactive application of Civil Code §4800.1 was unconstitutional denial of Due Process.

12/ Recognizing that Constitutional problems exist where the military member is divested of the pay if acquired before the effective date of the Former Spouses' Protection Act. See also Lynch v. United States (1934) 292 U.S. 771 [Congressional enactments impairing property rights nto retroactive]; United States v. Security Industrial Bank (1982) 74 L. Ed. 2d 235, 103 S. Ct. 407 [modification in the bankruptcy laws not retroactive to defeat already perfected creditor's claim]; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646) (1978); Prune Yard Shopping Center v. Robins, 447 US. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980); Armstrong v. United States, 364 U.S. 40, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1961).

of notice by California some 30 years after the conduct which has by subsequent Legislative enactment now become the basis for the intrusion upon his property rights is repugnant to the United States Constitution, Fourteenth Amendment.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

DATED: October 7, 1988

Respectfully submitted,

FORREST H. BURLESON
In propria persona

Brief prepared by:
LORETTA H. HELLEN
Attorney at Law
3101 First Avenue
Sacramento, CA 95817
(916)455-7551

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

In re the Marriage of JACQUELINE and FORREST BURLESON.	)	C003091
	)	Super.Ct.No. 39319
JACQUELINE D. BURLESON	)	
Respondent	)	FILED
	)	Apr 21 1988
v.	)	Court of Appeal
	)	Third District
FORREST H. BURLESON,	)	Wilfried J. Kramer
	)	Clerk
Appellant.	)	By _____ Deputy

Defendant Forrest H. Burleson (Forrest) appeals from a judgment ordering modification of the parties' interlocutory judgment and marital settlement agreement by awarding to plaintiff Jacqueline D. Burleson (Jacqueline), 49 percent of Forrest's gross military pension benefits beginning July 1, 1987, and further ordering Forrest to pay to Jacqueline the sum

of $19,750.42 representing Jacqueline's share of such pension benefits from January 1, 1986 to July 1, 1987. We shall affirm the result reached by the trial court but direct that it enter a new judgment deleting any modification of the prior interlocutory judgment or marital settlement agreement.

On September 13, 1952, in Kellogg, Idaho, Forrest and Jacqueline were married. Forrest enlisted in the United States Air Force on August 25, 1953. In 1967 and 1968 the couple moved to California. They separated on June 15, 1973. Forrest retired from the Air Force with the rank of lieutenant colonel on October 1, 1973.

Forrest filed a petition for dissolution on September 5, 1975, and an interlocutory judgment was entered on September 26, 1975, and attached thereto was the

parties' marital settlement agreement. The agreement contains no reference to Forrest's military retired pay. The final judgment of dissolution was entered on or about March 29, 1976.

Approximately 10 years later and on December 20, 1985, Jacqueline filed this post-dissolution action seeking one-half of Forrest's pension benefits as an omitted community property asset. After a bench trial, the trial court concluded that the pension was not mentioned in the parties' marital settlement agreement or interlocutory judgment and Jacqueline's interest in the pension had not been adjudicated. Judgment was entered for Jacqueline and Forrest timely appealed.

Forrest advances the following contentions: (1) military retired pay is not deferred compensation or a pension thus the trial court had no jurisdiction to

divide such pay; (2) division of military retired pay violates the contract clause of the United States Constitution; (3) a tenant-in-common relationship did not exist in the military retired pay after the parties' separation; (4) there is insufficient evidence to support the finding that Forrest's military retired pay was deferred compensation; and (5) Jacqueline's action claiming her share of the undivided asset was barred by estoppel, res judicata and laches. Jacqueline requests an award of fees and costs for responding to what she claims is a frivolous appeal filed for purposes of delay only.

Forrest's arguments are not novel. His attempt to distinguish his military retired pay as "retainer" pay in consideration for his continuing services to the United States Armed Forces rather than as "retirement" pay has been for many years

in California an unavailing semantic argument. (In re Marriage of Mercier (1975) 48 Cal.App.3d 775, 779-784.) "It is common knowledge that an individual who completes 20 years active military service is entitled to 'retirement' pay. The comparable provisions pertaining to Army and Air Force enlisted personnel both provide for the transfer of said personnel to the reserves of their respective services, and both impose the requirement that they shall perform such active duty as may be prescribed under law; however, both refer only to retirement.[]Officers of the Navy, Marine Corps,[] Army,[] and Air Force[] are also permitted to retire with the completion of 20 years of active service." (Id., at p. 782, deleted footnotes referring respectively to title 10 of the United States Code, sections 3914, 8914, 6323, 3911 and 8911.) As the Mercier

court concluded, "the distinction between 'retainer pay' and retirement pay' is now one of historical nomenclature . . . ." (Id., at p. 783.)

With the enactment of the Federal Uniform Services Former Spouses' Protection Act (FUSFSPA; 10 U.S.C.S. §1401, et seq.), Congress affirmed the principle that the subject of domestic relations is a state concern. (Casas v. Thompson (1986) 42 Cal.3d 131, 145, citing Ex Parte Burrus (1890) 136 U.S. 586, 593-594.) Section 1408, subdivision (c)(1) of FUSFSPA provides in pertinent part: "[A] court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." "Disposable

retired or retainer pay" is defined as the "total monthly retired or retainer pay to which a member is entitled" less amounts owed or deducted for specified reasons. (10 U.S.C.S. §1408, subd. (a)(4).) The enactment of FUSFSPA nullified the rule set forth in McCarty v. McCarty (1981) 453 U.S. 210 [69 L.Ed.2d 589], which held that military retirement pay was the military spouse's separate property under the federal military retirement scheme indivisible by state community property laws. (Casas, supra, at pp. 139-140.) "[I]t is clear FUSFSPA's primary purpose is to remove obstacles the state courts may encounter in applying their divorce laws to military retired pay as those laws were being applied before the decision in McCarty v. McCarty, and as if that decision never existed. Pre-McCarty California decisions treated military

retirement benefits like all other community property, dividing the total (gross) benefits.[] (See In re Marriage of Fithian [1974] 10 Cal.3d [592], 595, 604.)" (Casas v. Thompson, supra. 42 Cal.3d at pp. 145-146; fn. omitted.)

"[I]n In re Marriage of Fithian, supra, 10 Cal.3d at page 604, [the California Supreme Court] held 'military retirement pay must be realistically viewed as compensation for past, not present, services.' The [United States] Supreme Court in McCarty did not overrule Fithian's characterization of military retired pay as deferred compensation. (See McCarty v. McCarty, supra, 453 U.S. at p. 223 [69 L.Ed.2d at p. 600].)" (Casas v. Thompson, supra, 42 Cal.3d at p. 142, fn. 5.) We are bound to accept this state's highest court's characterization of military retired pay. (Auto Equity Sales,

Inc. v. Superior Court (1962) 57 Cal.2d 450.)

Forrest asserts that the trial court's judgment violates article I, section 10, subsection 1 of the United States Constitution, which provides that "No State shall . . . pass any . . . law impairing the obligation of contracts . . . ."

However, Forrest has not specified the terms of the asserted contract nor has he explained in comprehensible detail how the court's judgment violates the subject constitutional provision, nor has he cited any authority in support of his argument other than the constitutional provision itself. Forrest has therefore waived the point. (See Coates Capitol Corp. v. Superior Court (1967) 251 Cal.App.2d 125, 130; Utz v. Aureguy (1952) 109 Cal.App.2d 803, 807.) The same goes for Forrest's bald assertions that the judgment violates

unspecified federal statutory prohibitions against attachments and that this contract with the Air Force will fail for lack of consideration. "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion. [Citations.]" (People v. Ham (1970) 7 Cal.App.3d 768, 783; see In re Cindy B. (1987) 192 Cal.App.3d 771, 786, fn. 6, mod. 193 Cal.App.3d 1093a.) Forrest acknowledges that California courts have concluded that an omitted military "pension" benefit may be divided in an action in equity and until that time the parties are tenants-in-common. (Henn v. Henn (1980) 26 Cal.3d 323; In re Marriage of Cobb (1977) 68 Cal.App.3d 855; In re Marriage of Brown (1976) 15 Cal.3d 838.) However, based on his premise that this military retired pay

does not constitute retirement pay, he asserts no tenant-in-common relationship can attach to such earnings after the date of the parties' separation. His assertion must fail as we have already rejected his major premise.

Forrest's insufficiency of the evidence claim also rests on the characterization of his military retired pay. As such pay is deferred compensation under California law Jacqueline established her entitlement to a portion of Forrest's military retired pay fully vested and matured in 1973, three years prior to the parties' dissolution of marriage. Such pension benefit was earned during the marriage and was not previously divided. Jacqueline met her burden of proof. (Henn v. Henn, supra, 26 Cal.3d 323.)

For his final contention, Forrest argues Jacqueline is barred by laches,

estoppel, and res judicata to assert a claim to his pension benefit.

Jacqueline sought one-half of Forrest's military retired pay retroactive to the date of the parties' separation. The trial court applied the doctrine of laches to deny Jacqueline's request for her proportionate share of Forrest's gross retirement pay prior to January 1, 1986, the approximate date Forrest first learned of Jacqueline's claim for her share of the pension. Forrest claims that the trial court should have applied equitable principles to preclude any recovery, past or present, of her share of his pension benefits.

"Henn instructs the trial court to apply equitable principles in determining whether to enforce by restitution a spouse's community property interest in pension payments received by the retiree

spouse before partition and to what degree. (Cf. Hill v. Hattrem [1981] 117 Cal.App.3d 569, 574.) Where the court finds no unjust result in awarding full retroactive benefits, the court may 'tailor the form of that award' to avoid placing an undue burden on the spouse ordered to pay. (Id., at p. 575.)" (Casas v. Thompson, supra, 42 Cal.3d at p. 152.)

Under the facts here, res judicata and estoppel do not bar Jacqueline's post-dissolution action for her interest in the pension as their respective rights were not previously adjudicated by decree of divorce. (Casas v. Thompson, supra, 42 Cal.3d at 142; Henn v. Henn, supra, 26 Cal.3d at pp. 329-331.) "Regardless of whether the parties know of, or discuss, the vested pension, if the 'court was not called upon to award it, and did not award it, as community property, separate prop-

erty, or any property at all' (Giovannoni v. Giovannoni [1981] 122 Cal.App.3d 666, 672), then the pension is a missed asset subject to a postdissolution claim. (Henn v. Henn (1980) 26 Cal.3d 323, 330 [16] Cal.Rptr. 502, 605 P.2d 10].)" (Huddleson v. Huddleson (1986) 187 Cal.App.3d 1564, 1569.)

Forrest's reliance on Kelley v. Kelley (1977) 73 Cal.App.3d 672 is misplaced. As the Supreme Court stated in Henn: "Kell[e]y is disapproved to the extent that it stands for the proposition that any judicial division of community property necessarily precludes the subsequent litigation of community property rights in an asset known to exist at the time of the earlier proceedings, and which could have been adjudicated at that time." (Henn v. Henn, supra, 26 Cal.3d at p. 331, fn. 6.)

Forrest also relies on Shaver v. Shav-

er (1980) 107 Cal.App.3d 788. The Shaver court concluded that the parties' disposition of their property "should not be 'upset' by a 'belated assertion of an interest as a tenant in common in the employee's nonvested pension rights' . . . ." (Id., p. 794; emphasis added.) The Shaver court was guided by the rule set forth in French v. French (1941) 17 Cal.2d 775; 778: "[A] nonvested right to receive retirement pay was deemed an 'expectancy which is not subject to division as community property.'" (Shaver, supra, 107 Cal.App.3d at pp. 790-791.) The French holding was subsequently overruled by In re Marriage of Brown (1976) 15 Cal.3d 838, 841-842. Brown held that pension benefits whether vested or nonvested are the divisible community asset to the extent earned during the marriage. The Brown court, however, gave limited retroactive effect

to its holding which precluded application of the Brown rule to the facts in Shaver. The wife in Shaver under the French rule had no interest in her husband's nonvested pension benefit at the time of their dissolution in 1967. At the time the Shaver marriage dissolved, the husband had been employed less that the minimum number of years required to entitle him to retirement benefits. (Shaver, supra, 107 Cal. App.3d at p. 793.) The Brown rule applies here as Jacqueline had a divisible interest in Forrest's pension at the time of their dissolution. "[T]he crucial time to measure whether or not pension rights are vested is at the time of the dissolution --namely the date of the interlocutory decree. [Citations.]" (Huddleson v. Huddleson, supra, 187 CAl.App.3d at p. 1568.) Here, Forrest retired on October 1, 1973, and the interlocutory judgment was entered

on September 26, 1975. Forrest's pension rights were vested at the time of the interlocutroy decree.

Forrest testified at the hearing concerning the sacrifices he made over the years by paying spousal support every month even though Jacqueline was self-sufficient and by foregoing application for modification of such support award. He argued an award to Jacqueline of an interest in his pension at this late date would prove to be a financial hardship. He concerns were taken into account by the trial court in fashioning the judgment it did. The court ordered limited retrospective enforcement of Jacqueline's claim on equitable grounds, i.e. laches, in accordance with Henn. (Henn v. Henn, supra, 26 Cal.3d at pp. 332-333.) Moreover, at oral argument Jacqueline's counsel stated "We have agreed to get [the spousal support

order] modified and cut it to nothing the minute she starts receiving the pension." In light of this representation, we perceive no unfairness in the ultimate result achieved by the trial court's award of Jacqueline's interest in the pension to her.

Guided by the standards set forth in In re Marriage of Flaherty (1982) 31 Cal.3d 637, Jacqueline's request for sanctions against Forrest for a frivolous appeal is denied.

Although Forrest does not challenge the form of the court's judgment, we note the judgment orders modification of the interlocutory judgment and marital settlement agreement of the parties. As Jacqueline brought an independent action to determine her interest in Forrest's pension, the trial court's judgment is in error to the extent it orders modification

of a judgment entered in the separate dissolution action. Jacqueline's action here was to partition the unadjudicated property right she had in Forrest's pension. No modification of the interlocutory judgment and marital settlement agreement was proper in this independent action to apportion the parties' interest in Forrest's military retired pay. (Casas v. Thompson, supra, 42 Cal.3d at p. 141, fn. 4; Henn v. Henn, supra, 26 Cal.3d 323, 332; In re Marriage of Graves (1988) 198 Cal.App.3d 1047.)

On remand the trial court shall enter a new judgment awarding Jacqueline her interest in Forrest's military pension benefits but deleting any reference to any modification of the parties' marital settlement agreement or interlocutory judgment of dissolution of marriage.

DISPOSITION

The judgment is vacated. The matter is remanded to the trial court for entry of a new judgment consistent with this opinion. Respondent Jacqueline D. Burleson is awarded her costs on appeal.

/s/ SIMS , J.

We concur:

/s/ Puglia , P.J.

/s/ Carr , J.

ENDORSED
FILED
May 11, 1987
Frances J. Fairey, Clerk
By Sue Wacaster
Deputy Clerk

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF YUBA

JACQUELINE D. BURLESON	Case No. 39319
Plaintiff	STATEMENT OF DECISION
vs.	
FORREST H. BURLESON	
Defendant.	

This matter came on for trial on May 1, 1987, on the amended complaint filed May 30, 1986. Plaintiff, hereinafter referred to as wife, appeared in court with her attorney Minna Williams and defendant hereinafter referred to as husband, appeared in court with his attorney Loretta H. Hellen. Wife seeks a judgment establishing her rights in husband's military retirement payments and a decree

requiring husband to pay to her, one half of the retirement payments received by husband since the date of the parties' separation. Husband opposes these requests on various grounds, including jurisdictional and constitutional grounds and husband also argues that wife is collaterally estopped from seeking any share of husband's retirement benefits.

Husband and wife both testified and the evidence shows that they were married on September 13, 1952, in Idaho, and thereafter moved to California in 1967. Husband was involved in the R.O.T.C. program between 1949 and 1951, and he enlisted in the Air Force on July 18, 1953, and retired as a Lieutenant Colonel on October 1, 1973.

Husband prepared and filed a petition for dissolution of the marriage on September 5, 1975 and a stipulated interlocutory

judgment was filed in this court on September 26, 1975. A marital settlement agreement signed by both parties, on that same date, was attached to the interlocutory decree and made a part thereof. These documents were received into evidence and do not mention husband's retirement benefits in any way.

There is a dispute between the parties as to when separation actually occurred, husband testifing (sic) that the parties were separated in June of 1973 and wife claiming that the parties separated in September of 1975. Apparently the parties had agreed in 1973, to continue to live in the same house but to have separate bedrooms, furthermore, the court notes that the marital settlement agreement lists June 15, 1973, as the separation date and the court so finds.

At the conclusion of wife's case, hus-

band moved for non-suit and the court took the motion under submission. From the court's notes, it appears that the motion for non-suit is based on wife's alleged failure to properly describe the asset as "present earnings", or "retention pay", and on further ground, that wife allegedly failed to present evidence as to the vesting or non-vesting of the benefits. As pointed out to husband at trial, when he was called to testify in plaintiff's case in chief, he described the benefits as "current earnings" or "retention pay", and in any event, this court does not feel that the particular description used is controlling and the non-suit motion, on that ground, is hereby denied. Insofar as the vesting or non-vesting of the benefits is concerned, husband is referred to Huddleson v. Huddleson, 187 Cal. App. 3d 1564, for the latest controlling law on

the subject. Regardless, the evidence did show that husband was receiving the benefits prior to the filing of the interlocutory decree, in 1975, and therefore the benefits had obviously vested. The motion for non-suit, on that ground, is hereby denied also.

Husband's reliance on Kelley v. Kelley the 1977 case found at 73 Cal. App. 3d 672, is clearly unavailing, as it was specifically disapproved by the California Supreme Court case of Henn v. Henn, found at 26 Cal. 3d 323, and decided in 1980, at least to the extent that Kelley stands for the proposition that any judicial division of community property necessarily precludes the subsequent litigation of community property rights in an asset known to exist at the time of the earlier proceedings, and which could have been adjudicated at that time. In fact, the

case before the court presents a classic Henn situation and this court is obviously bound by the Supreme Court of this state.

Henn also addressed the doctrine of Res Judicata and collateral estoppel, the latter being the affirmative defense raised by husband. It is clear in this case that wife's community property interest in husband's Federal Military Pension was not adjudicated and therefore this subsequent action is not barred under the doctrine of collateral estoppel.

Husband's valiant and in large part well conceived opposition, based on constitutional and jurisdictional grounds, are also found, by this court, to be unavailing in light of the aforementioned Henn case and the now clear line of authority that exists in California. In footnote number 3, of the Henn decision, the United States Supreme Court case of

Hisquierdo v. Hisquierdo, (1979), 439 US 572, is taken into consideration by the California Supreme Court, and was specifically found not to compel reconsideration of the California position. (This is mentioned because husband, in his points and authorities, suggests that Hisquierdo, is controlling)

While Henn is the primary basis for the denial of husband's various agruments (sic) and defenses, it also serves as authority for this court to limit the equitable relief provided to wife herein. This authority is particularly important under the facts of this case where the evidence shows that husband, at the time of the divorce, was not only fair to his wife but was in fact generous. Based on Henn, this court does invite husband to move to reduce the spousal support, on the grounds that the support amount may well

have been set, in part, on the assumption of both parties, that wife had no property interest in the retirement benefits. Furthermore, under the doctrine of Laches, it is the decision of the court that husband's obligation to pay to wife, her proportionate share of husband's gross retirement benefits shall be effective as of January 1, 1986. The court has selected this date because it was at that time that husband first had formal notice that the retirement benefits may be subject to division. One can reasonably assume that he either set aside wife's possible share, or at least, on advice of counsel, should have done so.

The prevailing party, plaintiff, is requested to prepare the judgment in this matter and the parties are urged to meet and confer regarding the spousal support and the repayment to wife of her past due

share of the retirement benefits.

DATED: May 8, 1987

/s/ Dennis J. Buckley
DENNIS J. BUCKLEY
Judge of the Superior Court

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

3rd District, No. C003091

S005957

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D
JUL 13 1988
Laurence P. Gill, Clerk

Deputy

IN RE MARRIAGE OF BURLESON

BURLESON, Respondent,

v.

BURLESON, Appellant.

Appellant's petition for review DENIED.

/s/ Kaufman
Acting Chief Justice

MARITAL SETTLEMENT AGREEMENT

I, Forrest H. Burleson, Husband, and I, Jacqueline D. Burleson, Wife, agrees as follows:

I. GENERALLY: We are no husband and Wife. We were married on Sept. 13, 1952, and separated on June 15, 1973. We make this agreement to the following facts:

A. Children: There are the following minor children.

Barry D. Burleson Born Nov. 1, 1961

Annette D. Burleson Born June 12, 1964

II. SEPARATION: We agree to live separately and apart, and except for the duties and obligations imposed and assumed under this agreement, each shall be free from interference and control of the other as fully as if he or she were single. We each agree not to molest, interfere with or harass the other.

III. CUSTODY OF THE CHILDREN:

Jacqueline D. Burleson, the Wife, shall have the care, custody and control of the minor children of the parties, subject to the right of the other spouse to visit said children at reasonable times and places.

IV. SUPPORT OF CHILDREN: Subject to the power of the court to modify the same, Forrest H. Burleson shall pay to Jacqueline D. Burleson, as and for child support, the sum of $150.00 per month per child, a total of $300.00 per month, payable on the First day of each month, beginning on the First day of November, 1975, and continuing for each child until said child dies, marries, becomes self-supporting, or reaches the age of 18, whichever occurs first.

V. INSURANCE: Forrest H. Burleson shall carry and maintain a policy of

insurance upon his life in the amount of $100,000.00 of decreasing term insurance for a period of ten years, and shall name as beneficiaries (primary) Jacqueline D. Burleson and (secondary) any of the children born of this marriage, share and share alike.

VI. PAYMENTS TO WIFE: In consideration of the other terms of this agreement, Husband agrees to pay Wife the sum of $500.00 per month, payable on the First day of each month, beginning the First day of November, 1975, and continuing until the death of either party, or until it is mutually agreed between the two parties that the payments are no longer necessary.

VII. PROPERTY SETTLEMENT: Husband and Wife agree to divide their property to their mutual satisfaction, and each hereby transfers and quit-claims to the other any and all interest in any property in the

possession of the other, and agrees that whatever property the other may possess in now the sole and separate property of the other.

IX. DEBTS: There are no debts. Husband and Wife each promise the other that they shall not incur any debt or obligation for which the other may be liable, and each agrees that if any claim be brought seeking to hold one liable for the subsequent debts of the other, or for act or omission, then each will hold the other harmless, and defend such claim.

X. TAXES: The parties agree that any tax refunds for the current fiscal year shall be divided equally.

Any deficiencies for the current year shall be equally divided and paid by both parties.

XI. EXECUTION OF INSTRUMENTS: Each agrees to execute and deliver any docu-

ments, make all endorsements, and do all acts which are necessary or convenient to carry out the terms of this agreement.

XII. APPROVAL BY COURT: In the event of a dissolution proceeding, this agreement shall be submitted to the court of approval and incorporation into the decree, and the parties shall, by the terms of the decree, be ordered to comply with all terms of this agreement.

XIII. DISCLOSURES: Each party has made a full disclosure to the other of his current finances and assets, and each enters into this agreement in reliance thereon.

XIV. BINDING EFFECT: This agreement, and each provision thereof, is expressly make binding upon the heirs, assigns, executors, administrators, respresenta-

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tives, and successors in interest of each party.

Dated: September 25, 1975

/s/ FORREST H. BURLESON
Husband

Dated: September 25, 1975

/s/ JACQUELINE D. BURLESON
Wife

APPENDIX E
No. S-005957

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE MARRIAGE OF BURLESON:

FORREST H. BURLESON,
Petitioner

v.

JACQUELINE D. BURLESON,
Respondent

NO. C003091

IN THE COURT OF APPEAL OF CALIFORNIA

THIRD APPELLATE DISTRICT

In re the Marriage of JACQUELINE
and FORREST BURLESON.

JACQUELINE D. BURLESON,
Respondent

v.

FORREST H. BURLESON,
Appellant.

NOTICE OF APPEAL

Notice is hereby given that Forrest H. Burleson, Petitioner in the above-named cause, hereby appeals to the Supreme Court of the United States from the judgment and orders of the Court of Appeal for the 3rd Appellate District, sitting in Sacramento County, California, in which judgment was entered on April 21, 1988, and from the denial of petition for hearing of said judgment by the Supreme Court of California on July 13, 1988, which order is the final judgment or decree rendered by the hights court of the State in which the decision could be had. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

LORETTA H. HELLEN
Attorney for Appellant

PROOF OF SERVICE

I, Loretta H. Hellen, declare that I served a copy of the above Notice of Appeal on Appellee by placing a true copy thereof, class postage thereon, fully prepaid, in California, addressed as follows:

MINNA WILLIAMS
320 Fourth Street
Marysville, California 95901

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on October 5, 1988, at Sacramento, California.

LORETTA H. HELLEN

APPENDIX F:
Texts of Constitutional and Statutory Provisions.

United States Constitution

Impairment of Contracts. Art. I, § 10.

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

Supremacy Clause. Art. VI, Cl. 2.

[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Due Process Clause. Fourteenth Amendment, § 1.

[N]or shall any State deprive any person of . . . property, without due process of law . . .

Statutes.

28 U.S.C. § 1408, 96 Stat. 718, 730-738, Pub. L. No. 97-252 (1982). Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of

Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));

(iii) division of property (including a division of community property); and

(C) in the case of division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to a spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes,

if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(b) For the purposes of this section --

(1) service of a court order is effective if --

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order --

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay

periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the

member to the spouse or former spouse in a amount sufficient to satisfy the amount o child support and alimony set forth in th court order and, with respect to a divisio of property, in the amount of disposabl retired or retainer specifically provided fo in the court order. In the case of a membe entitled to receive retired or retainer pa on the date of the effective service of th court order, such payments shall begin no later than 90 days after the date o effective service. In the case of a membe not entitled to receive retired or retaine pay on the date of the effective service o the court order, such payments shall begi not later than 90 days after the date o which the member first becomes entitled t receive retired or retainer pay.

(2) If the spouse or former spouse t whom payments are to be made under thi section was not married to the member for period of 10 years or more during which th member performed at least 10 years of servic creditable in determining the member' eligibility for retired or retainer pay payments may not be made under this sectio to the extent that they include an amoun resulting from the treatment by the cour under subsection (c) of disposable retired o retainer pay of the member as a property o the member or property of the member and hi spouse.

(3) Payments under this section shal not be made more frequently than one eac month, and the Secretary concerned shall no be required to vary normal pay an

disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more

former spouses or to more than one former spouse, the disposable retired or retainer pay of a member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall --

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) Retain an amount of disposable retired or retainer pay that is equal to the lesser of --

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the

amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus --

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding the other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C.659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1)

or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the Untied States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of h is duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

U.S. Const. Art. I, §8:
Cls: 12: To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
13: Navy: To provide and maintain a navy.
14: Militray and Naval Rules: To make rules for the govenment and regulation of the land and naval forces;
16: Militia, Organizing and Arming: To provide for organizing, arming, and disciplining, the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia acording to the discipline prescribed by Congress.

STATE STATUTES:
Civil Code §4363.3: - ["Employee pension benefitplan"] As used in this part, the term "employee pension benefit paln" includes public and private retirement, pension, profit sharing, stock bonus, thrift and similar plans of deferred compensation, whether of the defined contribution or defined benefit type.

Civil Code 5118: [Earnings and accumulations constituting separate property: Income of spouse and children living separate from other spouse:] The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and aprat from the other spouse, are the separate property of the spouse.

CERTIFICATE OF SERVICE

I, DOUGLAS R. GREER, as a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of October, 1988, I served copies of the foregoing jurisdictional statement on the several parties thereto, as follows:

1. The Attorney General of the State of California, 1515 K Street, Sacramento, California, 95814;

2. United States Attorney, 3305 Federal Building, 650 Capitol Mall, Sacramento, California, 95814;

3. Minna Williams, Attorney at Law, 320 Fourth Street, Marysville, California, 95901 (Counsel for Appellee, Jacqueline D. Burleson)

As a result of the foregoing, all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct and executed this _____ day of October 1988 at Sacramento, California.

_____

DOUGLAS R. GREER

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-715

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER 1988 TERM

FORREST H. BURLESON,

Appellant

vs.

JACQUELINE D. BURLESON,

Appellee

On Appeal from the Court of Appeal
of California
Third Appellate District

MOTION TO DISMISS THE APPEAL

MINNA WILLIAMS
WILLIAMS AND WILLIAMS
320 Fourth Street
Marysville, CA 95901
(916) 742-8242

Attorney for Appellee

January 31, 1989

10 cpy

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Appellee requests that the Court dismiss the appeal because it is based on issues which have already been decided by the Court and thus do not present a substantial federal question.

I

STATEMENT OF FACT

Appellant's statement of fact is incorrect as follows:

1. Appellee does contest that all property had been disposed of by written agreement (Jurisdictional Statement, page 4).

2. Appellant did not receive 100% (or any %) of the pension pursuant to the marital settlement agreement (Jurisdictional Statement, page 5). The pension was not mentioned nor divided in said agreement.

3. The trial court did not award Appellee 49% of Appellant's future and

unearned pay (Jurisdictional Statement, page 5). It awarded 49% to wife of the retirement already earned after 20 years of service.

II

THE JURISDICTIONAL ISSUES

The issues raised deal with federal law and in that respect the Supreme Court has jurisdiction.

However, federal law has already decided the questions raised in the Jurisdictional Statement and no new issues have been raised.

The federal law already establishes that the state court may treat a military service member's retirement pay as community property; (The Former Spouses' Protection Act (FUSFSPA) Section 1408, subdivision (c)(1)) states:

> "A court may treat disposable retired pay or retainer pay to a member for pay periods beginning after June 25, 1981,

> either as property of the member or as the property of the member and his spouse in accordance with the law of the jurisdiction of such court..."

This law sets June 25, 1981 as the date for allowing state courts the right to divide the pension only because this is the date the McCarty decision was rendered. (McCarty v. McCarty, (1981) 453 U.S. 210 (69 L.Ed.2d 589).

Neither the Supreme Court nor Congress have before June 19, 1981 held that the military pension is not divisible by the states, the law in effect before McCarty was being re-instated by FUSFSPA.

In the present case the trial court applied the law in existence at the time the parties' separated. Said law was that the pension is a community property asset, divisible upon separation as any

other asset. FUSFSPA was not given retroactive effect.

The pension vested in 1973 when Appellant retired and started to receive the pension. The parties were divorced in 1975. Clearly the asset was, in 1973 and in 1975, a community property asset subject to division under federal and state law.

The federal law before McCarty let the states divide the pension and such division was not found to be unconstitutional under any law or case. The status and charaterization of the pension before McCarty was thus clearly established and no substantial federal question is involved.

The status and characterization of the pension after McCarty is established by FUSFSPA. If there are constitutional problems with FUSFSPA, they do not per-

tain to this present case. California's law in 1973 was (and still is) that a vested military pension is community property. Said pension may be divided at a later time, after the divorce, and only under certain circumstances.

The issue that the states are pre-empted from recharacterizing the pay as a pension benefit has already been resolved by the United States Supreme Court. California's characterization was not overruled in the McCarty case. (McCarty v. McCarty, 453 U.S., page 223 (69 L.Ed. 2d., page 600).

The questions of the constitutionality of California Civil Code 4303.3, of impairment of employment contracts, and of California subject matter jurisdiction, have all been decided in prior cases against Appellant and through the enactment of FUSFSPA Appellant's arguments have again been rejected.

III

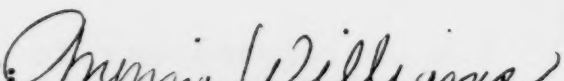
CONCLUSION

Appellee had a community property interest in the pension before FUSFSPA and she certainly cannot lose it because FUSFSPA has been enacted. There are no new issues in this case.

DATED: January 31, 1989.

Respectfully submitted,

WILLIAMS AND WILLIAMS

BY: 

MINNA WILLIAMS
Attorney for Appellee
Jacqueline D. Burleson

CERTIFICATE OF SERVICE

I, MINNA WILLIAMS, as a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of January, 1989, I served copies of the foregoing MOTION TO DISMISS THE APPEAL on the several parties thereto, as follows:

1. The Attorney General of the State of California, 1515 K Street, Sacramento, California 95814.

2. The United States Attorney, 3305 Federal Building, 650 Capitol Mall, Sacramento, California 95814.

3. Loretta H. Hellen, Attorney at Law, 3101 First Avenue, Sacramento, California 95817 (Counsel for Appellant, Forrest H. Burleson).

As a result of the foregoing, all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct and executed this 31st day of January, 1989 at Marysville, California.

MINNA WILLIAMS

NO. 88-715

Supreme Court, U.S.
FILED
FEB 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER 1988 TERM

FORREST H. BURLESON,

Appellant

vs.

JACQUELINE D. BURLESON,

Appellee

--oOo--

On Appeal from the Court of Appeal
of California
Third Appellate District

OPPOSITION TO MOTION TO DISMISS THE APPEAL

LORETTA H. HELLEN
Attorney at Law
3101 First Avenue
Sacramento, CA 95817
(916)455-7551

Attorney for
Appellant

February 9, 1989

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Appellant respectfully files opposition to Appelle's the motion to dismiss as follows:

I: THE QUESTION OF CHARACTERIZATION OF PAY HAS BEEN DETERMINED BY THIS COURT TO BE A FEDERAL QUESTION:

This Court has already decided that the question is a federal question; it simply deferred answering this question to another day, McCarty v. McCarty (1981) 453 U.S. 210, 69 L. Ed. 2d 589, 600:

> "Having said all this, we need not decide today whether federal law prohibits a State from characterizing retired pay as deferred compensation..."

The Former Spouses Protection Act has not manifested or conferred any jurisdiction upon State courts to contradict over 100 years of federal case and statutory law wherein the pay is continuously characterized and defined as "wages".

As the United States

Comptroller General stated in correspondence [unpublished case number B-221190: In the Matter of LT. COL. William A. Smith, Jr. USA (retired)], of which judicial notice was taken in this case,

"As to Colonel Smith's suggestion that military retired pay is current compensation rather than a pension for past services, we note that the [Former Spouses Protection] Act in no way redefines retired pay but merely allows state courts to treat this current compensation as divisible property if permissible under state law," (emphasis added).

Under California law, the current compensation of any party in a divorce action is NOT within the jurisdiction of the court and is NOT a divisible asset, Lang v. Superior Court, 153 C.A. 3d 510 (1984); California Rules of Court, Rule 1212; Tilghman v. Superior Court 40 Cal. 3d 599 (1974); Johnson v. Johnson (1963) 214 C.A. 2d 29; California Civil Code §§ 5110-5118.

The division is accomplished under California law IF AND ONLY IF the pay is REcharacterized as a pension or deferred compensation benefit, In re Fithian 10 Cal. 3d 592 (1974); In re Marriage of Brown 15 Cal. 3d 838 (1976); Henn v. Henn 26 Cal.3d 323 (1980); Casas v. Thompson 42 Cal. 3d 131 (1986).

The argument here is NOT about WHAT is a divisible asset under California law; the argument is about California courts redefining federal property [McCune v. Essign (199 U.S. 390 (1905); reversing State court distribution of federal property contrary to federal law], invading powers exclusively delegated to Congress by the Constitution [Knickerbocker Ice Co. v. Stewart 253 U.S. 149 (1923)], and ignoring stare decisis of this Court in excess of State court jurisdiction,

[Auto Equity Sales v. Superior Court 57 Cal. 2d 450 (1962)].

Appellant contends the State courts are preempted from recharacterizing the pay as a pension because such characterization defeats and destroys the federal statutory schema, McCarty v. McCarty, supra, 453 U.S. 200 [reaffirming that the pay is wages and a personal entitlement to the military member].

II: THE FEDERAL QUESTIONS ARE NOVEL:

A: WHETHER STATE COURTS MAY RECHARACTERIZE THE PAY AS DEFERRED COMPENSATION IS SETTLED TO BE AN UNANSWERED FEDERAL QUESTION:

In 1981, this Court framed (but did not answer) the question -- Are State courts preempted from REcharacterizing the retainer pay in a manner conflicting with and destructive to the federal statutory schema? McCarty v. McCarty, supra, 453 U.S. 210, 69 L. Ed.

2d 598, 600.

Based upon the framing of this and the companion question of preemption of State courts dividing the pay regardless of the characterization, this Court ruled:

"We have now concluded that this case properly falls within our appellate jurisdiction, and we therefore proceed to the merits," McCarty v. McCarty, supra, 453 U.S. 210, 69 L. ed. 2d 589, 598.

This Court further noted in McCarty:

"Appellant correctly notes that military retired pay differs in some significant respects from a typical pension or retirement...These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services. In United States v. Tyler, 105 U.S., at 245, 26 L. Ed. 985, the Court stated that retired pay is 'compensation...continued at a reduced rate and the connection is continued, with a retirement from active duty service only.'"

Appellant's jurisdictional statement clearly sets forth case law

sufficient to establish the continuing holdings of this and other inferior federal courts that reaffirm the ruling of this Court in United States v. Tyler, supra, 105 U.S. 243; to wit, military retainer pay is NECESSARILY current pay and NOT deferred compensation.

The IRS publication, Circular E, Rev. Jan. 1989, states:

> "Since military retirement pay is generally considered as wages, and not as a pension or annuity, military retirees should give you a Form W-4 to request income tax withholding, not Form W-4P."

See also, Internal Revenue Code §3401(a); Employment Tax Regulations section 31.3401(a)-1(b)(11); Black's Law Dictionary [defining "pay" as "consideration" for their "personal services"].

Appellant seeks recognition and reaffirmation by this Court that the pay is current wages.

B: THE UNCONSTITUTIONAL DELEGATION BY CONGRESS OF A NON-DELEGABLE CONSTITUTIONALLY DUTY EXCLUSIVELY IMPOSED UPON CONGRESS IS RAISED AS A MATTER OF FIRST IMPRESSION WITH RESPECT TO MILITARY RETIRED PAY:

It is well settled that Congress is prohibited by the Constitution from delegating powers exclusively designated as Congressional powers, Knickerbocker Ice Co. v. Stewart (1920) 253 U.S. 149; Appellant raises this issue as a case of first impression to this Court regarding military retired pay. As this Court has already determined, nothing is more federal in character than the payment of salaries to raise military forces on behalf of the nation, United States v. Tarble (1872) 80 U.S. 397. The power to raise and support the military -- and to control the pay -- is exclusively delegated by the Constitution to Congress.

III: THE ASSET WAS NOT OMITTED:

The Property Settlement Agreement, which does not specifically name any property or asset, recites as follows:

> Each party has made a full disclosure to the other of his current finances and assets, and each enters into this agreement in reliance thereon.
>
> Husband and Wife agree to divide their property to their mutual satisfaction, and each hereby transfers and quit-claims to the other any and all interest in any property in the possession of the other, and agrees that whatever propperty the other may possess is now the sole and separate property of the other.

At time of trial in 1987, in the equity action, Appellee testified that she knew WHEN SHE ENTERED THE AGREEMENT that Appellant was then receiving military retainer pay. She voluntarily assigned any claim she had to Appellant in return for other benefits; her support (which amounted to 98% of his net pay) was based solely upon this income. -8-

IV: AT THE TIME OF SEPARATION, THE PAY WAS NOT DIVISIBLE:

The parties separated in 1973; at that time, the pay was not a divisible asset, In re Marriage of Fithian, 10 Cal. 3d 592 (1974), cert den. 419 U.S. 825, 42 L. Ed. 2d 48, 95 S. Ct. 41 (1974) [holding for the first time that the military retired pay was deferred compensation and, therefore, a community property asset]. At the time the parties were divorced (1975) the pay was being divided under California law. It was a disclosed asset and it was awarded to Appellant pursuant to the general clause whereby each party quit claimed to each other all property then in the other party's possession.

V: THE INTENTION OF CONGRESS WAS NOT TO PERMIT FINALJUDGMENTS TO BE REOPENED:

See Defense Budget Appropriation Bill, 1989.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court take jurisdiction and permit

attempts to clarify the fact that the Former Spouses Protection Act was NOT INTENDED BY CONGRESS to have any retroactive effect. In particular, it was NOT the intention of Congress to permit the reopening of any judgments final prior to June 25, 1981; specifically, it was not Congress' intention to permit cases wherein the pay was not mentioned to be relitigated.

CONCLUSION

This Court should take jurisdiction and permit this case to be heard on the merits.

Dated: February 9, 1989

Respectfully submitted,

LORETTA H. HELLEN,
Attorney at Law
3101 First Avenue
Sacramento, CA. 95817
Counsel for Appellant
FORREST H. BURLESON

CERTIFICATE OF SERVICE

I, LORETTA H. HELLEN, as a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of February, 1989, I served copies of the foregoing OPPOSITION TO MOTION TO DISMISS THE APPEAL on the several parties thereto, as follows:

1. The Attorney General of the State of California, 1515 K Street, Sacramento, CA. 95814.

2. The United States Attorney, 3305 Federal Building, 650 Capitol Mall, Sacramento, CA. 95814.

3. MINNA WILLIAMS, Attorney at Law, 320 4th Street, Marysville, CA. 95901 (Counsel for Appellee, Jacqueline D. Burleson).

As a result of the foregoing, all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct and executed this 10th day of February 1989 at Sacramento, California.

LORETTA H. HELLEN